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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DELVIN DESHAWN SMITH, Defendant - Appellant.	No. 06-50415 D.C. No. CR-05-00986-JFW MEMORANDUM [*]

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Submitted August 8, 2007[**]
Pasadena, California

Before: **KOZINSKI,** Chief Judge, and **RAWLINSON,** Circuit Judge, and **BAER,**[***] Senior District Judge.

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Harold Baer, Jr., Senior United States District Judge of the Southern District of New York, sitting by designation.

1. Sufficient evidence exists to support Defendant's convictions. In reviewing the sufficiency of the evidence to support a criminal conviction, the inquiry is whether "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Sarausad v. Porter,* 479 F.3d 671, 677 (9th Cir. 2007). Sufficient evidence exists here to support the jury's conviction of Defendant under 18 U.S.C. § 924(c)(1)(A) because Defendant possessed a firearm in furtherance of a drug trafficking crime. *See, e.g., United States v. Hector,* 474 F.3d 1150, 1157 (9th Cir. 2007). Sufficient evidence also exists to support the jury's conviction of Defendant under 21 U.S.C. § 841 U.S.C. § 922 (g).

2. The district did not err in excluding at trial potentially exculpatory statements made by Defendant to authorities. "[S]elf-inculpatory statements, when offered by the government, are admissions by a party-opponent and are therefore not hearsay, but . . .non-self-inculpatory statements are inadmissible hearsay." *United States v. Ortega,* 203 F.3d 675, 682 (9th Cir. 2000). Defendant's potentially exculpatory statements also are not admissible as an "excited utterance" under Fed. R. Evid. 803(2), as the statements happened long after the "startling event." *See United States v. Alarcon-Simi,* 300 F.3d 1172, 1175-76 (9th Cir. 2002). Defendant's argument for a new trial on these grounds fails.

3. The district court, when it sentenced Defendant below his Guidelines range, did not apply the 18 U.S. C. § 3553(a) factors unreasonably. Nothing mandated the district court at the time of sentencing to take into account any disparity between Defendant's federal sentence and his potential sentence were he prosecuted in state court. *see United States v. Jeremiah,* 446 F.3d 805, 807 (8th Cir. 2006) (citing *United States v. Sitton,* 968 F.2d 947, 962 (9th Cir. 1992)).

AFFIRMED.